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To: The Office of the Comptroller of the Currency (submitted through the OCC website)
The Board of Governors of the Federal Reserve System (By email: regs.comments@federalreserve.com)
The Federal Deposit Insurance Corporation (By email: comments@fdic.gov)

Re: Docket ID OCC-2022-0002 (OCC)
Docket No. R-1769; RIN 7100-AG29 (Federal Reserve)
RIN 3064-AF81 (FDIC)

Ladies and Gentlemen:

These comments are respectfully submitted to the Office of the Comptroller of the Currency (the “OCC”), the Board of Governors of the Federal Reserve System (the “Board”), and the Federal Deposit Insurance Corporation (the “FDIC”) (collectively, the “Agencies”), in response to the Agencies’ joint Notice of Proposed Rulemaking published in the Federal Register on June 3, 2022, 87 Fed. Reg. 33,884.

The undersigned commenter, the National ATM Council, Inc. (“NAC”), is a nationwide not-for-profit trade association representing the interests of the owners, operators, and servicers of, and suppliers to, independent, *i.e.*, although bank-sponsored, nonbank-owned/operated, automated teller machines (“ATMs”) deployed throughout the nation (“Independent ATMs”). According to a locational study published in 2018 by faculty members of the Department of Economics and Geography at the University of North Florida, a copy of which is submitted herewith as Exhibit A, of the more than 470,000 ATM terminals in service in the United States during the period of the study, more than 378,000—representing 59.2 percent of the total—were independently owned and operated.

NAC appreciates the opportunity to comment on the Agencies’ proposed revision of their regulations that are intended to implement the Community Reinvestment Act of 1977 (the “CRA” or the “Act”), 12 U.S.C. §§ 2901 *et seq.*

Among the conclusions of the study referenced above is its finding that: “[C]ompared to ATMs owned by banks or financial institutions, the independent ATMs tend to be located in areas with less population, lower population density, lower median and average income (household and disposable), lower labor force participation rate, less college-educated population, higher unemployment rate, and lower home values.” Exh. A at 2.

Independently owned ATMs, therefore, not only constitute a majority of all ATMs serving American businesses and consumers, but, compared to ATMs owned and operated by banks and other financial institutions, Independent ATMs also are more frequently located in low- and moderate-income neighborhoods—and thus serve low- and moderate-income consumers—who are a particular focus of the CRA, which was enacted to ensure that the nation’s depository institutions “serve the convenience and needs of the communities in which

they are chartered to do business.” 12 U.S.C. § 2901(a)(1). Importantly, the Act goes on, in the next paragraph, to highlight the CRA’s acknowledgment that “the convenience and needs of communities include the need for credit services *as well as deposit services*.” *Id.*, § 2901(a)(2) (emphasis supplied).

Thus, the Act explicitly includes “deposit services” as among the retail banking services that the CRA seeks to ensure remain regularly available in every community served by a federally supervised depository institution.

Since the federal government’s launch of Operation Choke Point nearly a decade ago, independent ATM owners and operators have experienced, and continue to this day to suffer from, a crisis that has resulted from the persistent, continuous, and wholly unfounded refusal of numerous U.S. depository institutions to offer or provide deposit services to independent ATM businesses. Regular and reliable access to at least one deposit account in an insured depository institution is absolutely essential for the operation of every ATM business.

It is only through such an account that an independent ATM owner or operator can obtain access to the U.S. payments systems, through which ATMs located anywhere in the country are able to communicate with a cardholder’s depository institution, without regard to where in the country it may be located, and thereby enable the cardholder to complete a withdrawal from, or a deposit to, his or her account at any insured depository institution, regardless of how distant or remote it may be.

Obtaining and maintaining reliable access to deposit services thus is essential for every independent ATM owner/operator. Over the past seven to eight years, NAC has received documented reports from scores of independent ATM operators, seeking NAC’s assistance in obtaining a bank account, or keeping a bank account after having been informed by the depository that the ATM business’s account (or accounts) will be closed.

In virtually none of these instances in recent years has the institution provided any specific reason or justification for its action in closing an existing account or declining to open a new one. NAC is unaware of even a single instance of any illicit activity or wrongdoing that ever has been alleged in connection with any of the substantial number of account closures experienced by Independent ATM operators throughout the nation.

Some ATM operators have been told that their accounts have been closed “as a result of a routine security review,” or because “the risk profile of your business is unacceptably high,” or because the bank “can’t meet your needs for cash.” In all too many cases, the institution has erroneously claimed that the account was closed because the ATM operator was a Money Services Business (“MSB”), despite the longstanding advisory from the Financial Crimes Enforcement Network (“FinCEN”), issued in 2007, that such entities are not MSBs.

NAC's members understand and accept the need for depository institutions to conduct appropriate due diligence on their customers engaged in cash-intensive businesses, and they have been and are willing to cooperate fully in the due diligence that is conducted by their bankers, and to provide comprehensive and timely information about their sources of funds, the locations of their terminals, the past history of transactions at those locations, and expected future transactions at them.

Still, these businessmen and businesswomen find that their existing accounts are being closed, without explanation, and that their efforts to obtain new accounts too often come to a sharp halt once they mention that are engaged in an ATM business. On those occasions when a bank has offered to open or maintain an operator's account if the accountholder agrees to secure it, the terms and pricing often have been onerous, increasing costs to any such ATM operator and its customers. For all these reasons, obtaining and keeping deposit services are matters of considerable urgency to every Independent ATM businessperson.

The importance of banks' provision of deposit services that the CRA appears to emphasize had seemed, at first glance, to offer some hope to the independent ATM industry in its longstanding efforts to obtain assurance of the ability of its members to obtain and keep access to bank accounts.

Current CRA regulations provide that the Agencies are to evaluate depository institutions' discharge of their obligation to "serve the convenience and needs of the communities in which they are chartered to do business" by employing, among other things, what the regulations call the "Service test," set forth, for OCC-supervised institutions, in 12 C.F.R. § 25.24, and in corresponding sections for institutions supervised by the FDIC (12 C.F.R. § 345.24) and the Board (12 C.F.R. § 228.24).

Under subsection (a) of these regulations, the scope of the Service test mandated by the Agencies includes analyzing "the availability and effectiveness of a bank's systems for delivering retail banking services." Subsection (d), headed "*Performance criteria—retail banking services*," includes four subparagraphs that enumerate specific factors that the Agencies are to consider in evaluating each institution's performance of its obligations under the CRA. Subparagraph (3) directs that the Agencies consider:

The availability and effectiveness of alternative systems for delivering retail banking services (*e.g.*, ATMs, *ATMs not owned or operated by or exclusively for the bank*, banking by telephone or computer, loan production offices, and bank-at-work or bank-by mail programs) in low- and moderate-income geographies and to low- and moderate-income individuals.

(Emphasis supplied.) Under this subparagraph, therefore, the current regulations expressly require that the CRA performance of every depository institution be evaluated on the basis of, among other things, the “availability and effectiveness,” within the institution’s communities, of ATMs “not owned or operated by or exclusively for” that institution—obviously referring to ATMs owned or operated by other institutions, and those owned or operated by Independent ATM companies.

If, therefore, under these regulations, a bank were to take, without reasonable cause, any action—such as refusing deposit services to an Independent ATM operator deploying ATMs in the bank’s communities—that had the effect of impairing or diminishing the availability and effectiveness of independently owned ATMs within those communities, it would appear straightforward that such action would be contrary to the bank’s obligations under the Act and thus would constitute grounds for lowering its CRA rating assigned under 12 U.S.C. §§ 2903 & 2906.

For what other purpose would the Agencies have specified that the availability and effectiveness of banking services, provided by or through ATMs deployed by third parties, as among the factors to be considered in evaluating an institution’s CRA performance, if an institution’s action that diminishes the availability and effectiveness of such banking services were to have no effect on the institution’s CRA rating?

We very much regret that the proposed regulations, as we understand them, wholly fail to recognize any obligation on the part of depository institutions subject to the CRA to promote or encourage—or at least to refrain from discouraging—the provision of retail banking services in the communities in which they are chartered to do business, by providers, such as Independent ATM operators, that are not affiliated with those institutions.

The provision of the proposed regulation that corresponds to the “Service test” in current regulations appears to be § __.23, headed “Retail services and products test,” which begins at 87 Fed. Reg. 34,026.

The scope of the test is described, in paragraph (a), as intended to evaluate “the availability and responsiveness of a bank’s retail banking services and products targeted to low- and moderate-income individuals and in low- and moderate-income census tracts in a bank’s facility-based assessment areas, and at the state, multistate MSA, and institution levels.” The subsection goes on to say that each agency “considers the bank’s delivery systems, as described in paragraph (b) of this section, and the bank’s products and other services, as described in paragraph (c) of this section.”

Given the breathtaking consolidation that the banking industry has experienced in recent years, and continues to experience—including the widespread, if not accelerating, closure of bank offices and branch offices, sometimes to be replaced with cashless branches, or with kiosks

that have no onsite employees and offer only remote video communications with distant bank personnel—we respectfully suggest that, in the Agencies’ continuing implementation of the Act, in furtherance of their obligations pursue the goals and objectives of the CRA and of the Congress when it was enacted, it is difficult to conceive of anything that would be more inappropriate and unnecessary, and more deleterious to the communities and the individuals for whom Congress intended to provide benefits when it enacted the CRA, than this portion of the proposed regulation.

The proposal seems calculated to focus the Agencies’ evaluations of compliance with the Act solely upon the “delivery systems” of any institution subjected to examination under the CRA, first, upon the branch availability and distribution solely of that institution’s branches, and, second, upon the availability and distribution solely of that institution’s remote service facilities—all as is provided for in proposed §§ __.23(b) and (b)(1)-(3), *id.*, at 34,026-27—without giving any regard whatsoever to acts, omissions, policies, or practices of the institution that, directly or indirectly, could affect or impair the availability or effectiveness of other systems for the delivery, by providers unaffiliated with the institution, of retail banking services within the communities in which the institution is chartered to do business.

NAC was both surprised and extremely disappointed to learn, as is emphasized by the discussion at 87 Fed. Reg. 33,963, that under the proposed regulation, the remote service facilities that should be considered in evaluating the CRA performance of any bank include only such facilities that are “owned or operated by, or operated exclusively for” that bank. *Id.* & n.207 (quoting the definition of “remote service facility” in proposed § __.12). Such a result is plainly illogical and incongruous, in light of the prevalence of Independent ATMs within the nation’s low- and moderate-income communities, as shown in Exhibit A, when it is such communities that clearly are among the intended beneficiaries of the CRA.

We therefore respectfully urge that the Agencies reconsider the provisions of proposed § __.23(b) toward expanding the factors to be considered, in assessing an institution’s CRA performance, to incorporate consideration of the effects that actions, policies, or practices of any such institution may have on “the availability and effectiveness, within the communities in which the institution is chartered to do business, of services provided by or through remote service facilities not owned or operated by or exclusively for the bank.”

The focus of the Agencies’ evaluation of banks’ performance under the CRA, we submit, properly should be upon, first, the availability and effectiveness of retail banking services for members of the public in the communities in which the bank is chartered to do business, without regard to whether those services are provided by the bank or by other providers, and, second, whether the actions, policies, or practices of the bank may have the effect of restricting, limiting, or curtailing, unreasonably or without justification, the availability or effectiveness of any such services.

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If such availability or effectiveness is determined to be insufficient, or if it should be determined that actions, policies, or practices of the bank may have the effect, unreasonably or without justification, of restricting, limiting, or curtailing the availability or effectiveness of such services, such a determination would appear to constitute appropriate grounds for lowering the institution's CRA rating. By contrast, actions of any institution that are found to promote and support the deployment of such services by third parties in its communities should constitute grounds for raising the institution's CRA rating.

Again, NAC wants to take this opportunity to express its gratitude to the Agencies for the opportunity to comment on the proposed regulations. If we may provide any further information in connection with any of the discussion contained herein, we would be please to do so upon your request.

Very truly yours,

/s/Bruce W. Renard
Executive Director
The National ATM Council, Inc.